

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: Chapter 11
W.R. Grace & Co., et al.,
Debtor(s). Bankruptcy #01-01139 (JKF)

Wilmington, DE
October 27, 2003
12:00 p.m.

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For The Debtor: David Carickhoff, Esq.
Pachulski, Stang, Ziehl,
Young, Jones & Weintraub
919 North Market Street
Wilmington, DE 19801

Janet S. Baer, Esq.
Kirkland & Ellis
200 E. Randolph Drive
Chicago, IL 60601

For Equity Security Holders: Gary M. Becker, Esq.
Committee Kramer Levin Naftalis
& Frankel, LLP
919 Third Ave.
New York, NY 10022

For Asbestos PI Committee: Mark T. Hurford, Esq.
Campbell & Levine, LLC
800 North King Street-Site. 300
Wilmington, DE 19801

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

JKF

1	For Asbestos PD Committee:	Theodore J. Tacconelli, Esq. Ferry, Joseph & Pearce, PA 824 Market Street Wilmington, DE 19899
2		
3	For Trade Committee:	Michael Lastowski, Esq. Duane Morris, LLP 1100 N. Market St.-Ste. 1200 Wilmington, DE 19801
4		
5		
6		Moshe Sasson, Esq. Stroock Stroock & Lavan, LLP 180 Maiden Lane New York, NY 10038
7		
8	For London Market Insurers:	Francis J. Murphy, Esq. Murphy Spadaro & Landon 824 Market st.-Ste. 700 Wilmington, DE 19899
9		
10		
11		Michael J. Zoeller, Esq. Baach Robinson & Lewis, PLLC One Thomas Circle-Ste. 200 Washington, dC 20005
12		
13	For Holland:	Thomas D. Walsh, Esq. McCarter & English, LLP Mellon Bank Center 919 Market sTreet-Ste. 1800 Wilmington, DE 19899
14		
15		
16	For Bank Group:	Denise S. Kraft, Esq. Klehr Harrison Harvey Bransburg & Ellers, LLP Mellon Bank Center 919 Market St.-Ste. 1000 Wilmington, DE 19801
17		
18		
19		
20	For Old Castle N.E.:	William D. Sullivan, Esq. Elzufon Austin Reardon Tarlov & Mondell, PA 300 Delaware Ave-Ste. 1700 Wilmington, DE 19899
21		
22		
23	Audio Operator:	Sherry Scaruzzi
24		
25		

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Transcribing Firm:

Writer's Cramp, Inc.
6 Norton Rd.
Monmouth Jct., NJ 08852
732-329-0191

Proceedings recorded by electronic sound recording, transcript
produced by transcription service.

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1	Index			
2		Direct	Cross	Further
		Redirect	Recross	Redirect
3	Witnesses For The:			
4	Objectors			
5				
6	Witnesses For The			
7	Debtor:			
8				
9	MOTIONS:			
10				
11				
12	EXHIBITS:		<u>Marked</u>	<u>Received</u>
13				
14				
15				
16	SUMMATION BY:			
17				
18				
19				
20	THE COURT: Finding	38		
21				
22				
23				
24				
25				

1 THE COURT: Good afternoon. Please be seated. This
2 is the matter of W.R. Grace, Bankruptcy #01-1139.

3 MS. BAER: Good morning, Your Honor --

4 THE COURT: Good afternoon.

5 MS. BAER: -- Janet Baer on behalf of the Debtor.

6 THE COURT: Ms. Baer?

7 MS. BAER: Your Honor, the first matter on
8 Caterpillar Financial is being continued once again, and I
9 believe the new date is November 17th at noon. Your Honor, the
10 second matter on the calendar is the Debtors' Motion Extending
11 Time to assume, assign, or reject unexpired leases of
12 nonresidential real property. We've submitted a Certificate of
13 No Objection and would ask the Order be entered.

14 THE COURT: Yes, items 2, 4, and 5 I directed my
15 staff to enter those Orders. I don't think they've actually
16 been done yet, but they will be.

17 MS. BAER: Thank you, Your Honor. That takes us to
18 item 3, the application of the Debtor to retain Protiviti as
19 Sarbanes-Oxley counsel. Your Honor, we spoke with Protiviti
20 last week after the U.S. Trustee filed an objection to the
21 application challenging the nunc pro tunc nature. Protiviti
22 would like the opportunity to file a supplemental affidavit
23 explaining the situation and the justification for the request.
24 We're asking that the matter be put over to the November 17th
25 hearing.

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 THE COURT: All right. Is there anyone here from the
2 U.S. Trustee? No. Any objection to that by the U.S. Trustee?

3 MS. BAER: We did call the U.S. Trustee on Friday
4 and tell him we were going to ask for continuance.

5 THE COURT: All right, thank you.

6 (Clock chimes)

7 THE COURT: It's better than elevator music.

8 (Laughter)

9 MS. BAER: Your Honor, the next matter on your
10 agenda is the Debtor's application -- this is agenda item #6,
11 the Debtors' application to retain State Street Bank as
12 Investment Manager and Fiduciary for the Grace Stock that's
13 contained within the Grace Savings Plan. Your Honor, there
14 have been two objections to this filed, one by the Equity
15 Committee, one by the Unsecured Creditors Committee. The
16 Equity Committee raised an objection as to what was the reason
17 for this. I believe Grace was pretty clear in the application,
18 but then did supplement it with a reply and an affidavit from
19 Brian McGowan who is one of the members of the Investment
20 Committee. Your Honor, it's very simple. The Investment
21 Committee and the Board of Directors of Grace are in an
22 impossible situation. On the one hand, under ERISA. They are
23 fiduciaries to make decisions as to whether or not to do things
24 with the Grace stock, sell, hold, and the like. Your Honor,
25 these are the very same people who will be making decisions on

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 the Grace Chapter 11 Plan. The Investment Committee members
2 are two key members that are helping us put together the
3 various numbers and the various information necessary to
4 negotiate a plan. The Board, of course, is involved in that
5 process. It is impossible for them to continue to act as
6 fiduciaries for the Grace stock and at the same time fulfill
7 their fiduciary roles, both under the FCC Rules, as well as the
8 Bankruptcy Code. In this particular circumstance, Your Honor,
9 we think that the business judgment rule suggests to do the
10 prudent thing here, invest, or retain an investment manager
11 like State Street to come in and exercise those fiduciary
12 obligations to make sure that the ERISA obligations that are
13 there are fulfilled and the Grace Board and the Investment
14 Committee can fulfill their obligations to Grace in this
15 bankruptcy case. Your Honor, the second objection that was
16 filed was by the Unsecured Creditors Committee. Nobody's
17 objecting to State Street, its expertise, its fees, the
18 indemnity, the objection simply is to who pays, and Your Honor,
19 in that respect again, Grace's business judgment would suggest
20 that it is appropriate in this case for the company to pay the
21 fees and expenses of State Street and its investment adviser.
22 Your Honor, we have submitted an affidavit from State Street
23 indicating that in this business in the nature of what is being
24 done here, it is standard to have the company pay. Again, we
25 are not doing this because it's necessary so much at the

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 employees' request. We are doing it because the company needs
2 to do this. The company has fiduciary obligations which it is
3 having difficulty fulfilling because of the conflict of
4 interest, so the company needs to put somebody in there, an
5 independent third party who can make those decisions. In
6 addition, Your Honor, this is for the benefit of the Grace
7 Savings Plan. This is a savings plan that is invested in by
8 the rank and file of Grace. Approximately 85 percent of all
9 Grace employees in the United States participate in this plan.
10 This is a plan, of course, that has been devastated by the
11 Chapter 11. The stock that was once there and worth a great
12 deal is worth so very little today due to what has happened in
13 the asbestos world and Chapter 11. It would be a horrible
14 situation to have to now tell the employees not only that
15 they're gonna have to deal with what's happened to their stock,
16 but now we're going to have to charge them to have somebody
17 fulfill the fiduciary duties here of deciding what to do with
18 that stock. Under these circumstances, Your Honor, we believe
19 the appropriate thing to do here is to have the company pay the
20 fees of State Street Bank. In addition, Your Honor, there is
21 no fund of money that these fees could be taken from in the
22 Plan to pay State Street and its professionals. Quite to the
23 contrary, Your Honor, this is allocated by individual employee
24 account, so if the fees were paid by the Plan it would actually
25 come out of each individual employee's account. The morale

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 that we have been trying to hold would be devastated by that.
2 It is not something that we believe, in our best business
3 judgment, is something that would be wise and appropriate for
4 the company. Under those circumstances, Your Honor, we would
5 ask that State Street be retained under the provisions of the
6 agreement that is before Your Honor and that the company be
7 authorized to pay the fees and expenses of State Street. Thank
8 you.

9 THE COURT: Okay. Well, this motion says -- wait
10 maybe I'm confusing it with the one before. No, I'm not. It
11 says for an order authorizing but not requiring the employment.
12 I'm not sure what the termination provisions are, number one,
13 and number two, if the Debtor does make the payment -- does
14 involve State Street in this issue it seems to me, frankly,
15 that the Debtor ought to be the entity that makes that payment,
16 but what if the Debtor doesn't, then who has to pay? So, it
17 seems to me that if the Debtor wants to do this, and the
18 Debtors' discretion, I think, is advisable with respect to the
19 decision whether to engage in this process, but once it
20 engages, seems to me the fees ought to be paid. The Creditors,
21 that is the account holders, if the Debtor is agreeing to
22 undertake their cost shouldn't later have to absorb that cost.

23 MS. BAER: Your Honor, it is not our intention that
24 they would absorb the cost. The Debtor is intending to hire
25 State Street and to pay those costs.

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 THE COURT: Okay. Then why is it listed in, may but
2 doesn't have to, language?

3 MS. BAER: Your Honor, it's standard lawyer language
4 that we put into some of these applications because we like
5 to, if you will, you know, hold open the possibility that if
6 circumstances change we would not go forward. It is our
7 intention to go forward here, Your Honor. We have no problem
8 striking that particular language. We want to go forward, we
9 want to hire State Street, we want to pay those fees.

10 THE COURT: All right. Someone want to be heard from
11 the Equity Committee? Okay, Creditors, go ahead.

12 MR. SASSON: Good afternoon, Your Honor, Moshe Sasson
13 from Stroock, Stroock & Lavan on behalf of the Creditors
14 Committee. Your Honor, the Creditors Committee objects to
15 Debtors' application only to the extent that it seeks to burden
16 the Debtors' Estates and its Creditors with the fees and
17 expenses that benefit only a certain block of equity holders.
18 The Committee believes that the State Street expenses, as well
19 as the other professionals retained to assist them, should be
20 borne by the equity group benefitting from the services. That
21 is to say, the costs should be borne by the Trust or the Plan,
22 and not the Estate. There's no legal requirement that these
23 expenses be borne by the Debtor and its Creditors. The fact is
24 that the Debtor can chose to charge the Estate or the Plan, and
25 here the Debtor has sought to charge the Estate in attempts to

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 justify this choice with the purported justification of
2 employee morale. That's a amorphous, objective term which
3 can't be measured or tested.

4 THE COURT: But the Debtor's already bearing the
5 expense, it's just bearing it because its current officers and
6 directors are doing the work. The Debtor's already paying for
7 the fees, it's just that at this point in time it may be some
8 additional costs because you've got to hire an independent
9 third party.

10 MR. SASSON: My understanding is that the fees now
11 would be minimal, and we're now talking about an increase to
12 about a million dollars a year.

13 THE COURT: Well, maybe if this is duties that are
14 coming out of the officer's compensation or duties that are
15 coming off of the officer's responsibilities maybe there
16 should be some adjustment made to officer's compensation to
17 assist in the payment. But, nonetheless, I don't think that
18 the employees who are making this investment should be charged
19 with this burden.

20 MR. SASSON: Well, Your Honor, I guess the issue is
21 whether the justification of employee morale is sufficient to
22 justify charging the Creditors and the pockets coming out of
23 for the expenses that they anticipate.

24 THE COURT: Well, the Debtor's telling me that there
25 is no fund. This isn't a plan -- it's not a Trust that

1 generates the kind of fund that would be normally used to
2 pay --

3 MR. SASSON: My understanding is that -- don't mean
4 to interrupt, Your Honor -- but that the Trust has sufficient
5 assets and generates income sufficient to pay these expenses.
6 It's not that it couldn't pay the expenses. It's just that
7 they would prefer to have the company pay the expenses and not
8 have the Trust and the Plan pick up these expenses. It
9 certainly has the assets and the income to pay these expenses.

10 THE COURT: Well, I mean, it seems to me that they're
11 not being charged that way against the Trust in the Plan now.
12 Now, I haven't looked at the ERISA document to see whether it
13 can be modified to put those expenses into the Plan, I'll just
14 assume without deciding at the moment that it can be, but why
15 is that appropriate when this is an investment backing to the
16 company stock by the people that you want to have an ownership
17 interest in the company, the employees?

18 MR. SASSON: It's an unfortunate expense that needs
19 to occur. The question is who should have to bear it, and we
20 believe that the Creditor block that's going to be benefitting
21 by these investment services should be the party to bear that
22 expense.

23 THE COURT: Well, I don't know that the employees are
24 Creditors at all. I mean, maybe they are. I don't know that
25 they are Creditors. It seems to me that you don't want to do

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 something to jeopardize the employees' relationship with the
2 company. What may be appropriate is to re-examine the
3 officer's compensation. If this is taking a million dollars
4 worth of duties out of the officers and putting it into State
5 Street it may be that at this point in time their compensation
6 should be reexamined, but I don't see in any way that it's
7 appropriate to put this onto the employees whose interest in
8 this company you want to foster, not terminate.

9 MR. SASSON: Well, certainly, Your Honor, we don't
10 want to do anything to injure employee morale, we just don't
11 think that passing on these expenses to the employees would
12 necessarily do that. Given the rough cost of about a million
13 dollars a year, and we've been advised that the Plan has
14 several thousand participants, we're talking about roughly a
15 few hundred dollars per year per member, and for a limited
16 amount of time.

17 THE COURT: Do you want to do the notice to all of
18 those employees that tell them that their plan may be changed
19 and that they may be paying a cost as a result of this service
20 for investing in the Debtor, remembering that it's the
21 Creditors assuming that there's a 524(g), assuming that there
22 is, because I haven't seen a plan that goes through that is
23 eventually going to own this company, and that's the risk
24 you're taking.

25 MR. SASSON: We understand that risk, Your Honor,

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 and you know, there have been prior applications made where
2 employee morale was a justification, and we acceded to those
3 prior requests. For example, the Committee --

4 THE COURT: Yes, I know, I'm familiar with them.

5 MR. SASSON: We don't believe --

6 THE COURT: That's not relevant to this.

7 MR. SASSON: We don't believe that this is such an
8 example.

9 THE COURT: All right.

10 MR. SASSON: Furthermore, Your Honor, to the extent
11 that the Court is inclined the grant the Debtors' application,
12 the Committee believes that the fees of the professionals
13 retained by State Street, namely Duff & Phelps and the legal
14 counsel should be subject to the same audit and review
15 procedures as the professionals in this case. I'm not certain
16 that their retention agreement provides for that, and I don't
17 see any reason to exclude them from the same review procedures
18 that apply to the professionals here today.

19 THE COURT: Well, that I'm a little bit more
20 sympathetic to. I'm not sure why they should be excluded
21 either, because at this point in time they are acting on behalf
22 of the Estate, I mean, it's through the State Street Bank,
23 admittedly, but nonetheless, State Street's essentially picking
24 up a fiduciary duty to the employees of the company. Why is it
25 that their adviser shouldn't have some corresponding obligation

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 to have their fees reviewed?

2 MR. SASSON: Thank you, Your Honor, I think the --

3 THE COURT: All right.

4 MR. BECKER: Good afternoon, Your Honor, Gary Becker
5 from Kramer, Levin for the Equity Committee. Your Honor, we
6 objected originally, and continue to object, because it doesn't
7 appear that this action will benefit the Debtors' Estate.
8 Presumably, I believe it's established now that the services
9 are currently being performed by some of the Debtors' officers.
10 As Your Honor pointed out, there's been no proposal that the
11 officer's compensation be reduced, it's just adding on \$530
12 thousand in fees and further legal expenses for what benefit to
13 the Estate?

14 THE COURT: Employees who want to continue to invest
15 in the company.

16 MR. BECKER: Well, they can continue to invest in the
17 company. As I understand the problem, this is more in the
18 nature of an insurance policy in the event that these officers
19 have material non-public information and that somehow conflicts
20 with their duty to sell the stock on behalf of the Investment
21 Plan.

22 THE COURT: To a certain extent I think that's true.
23 The other thing is I would think that the employees would feel
24 more comfortable knowing that somebody who isn't about,
25 perhaps, to pull their own rug out from under the value of the

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 stock in the Chapter 11 Plan it may have to turn over even
2 their stock investments, I don't know, to a group of asbestos
3 Creditors that that decision's being made by somebody other
4 than the Board of Directors who set this process up. I don't
5 know that these individuals Directors did, but a board that set
6 this process up and now has to turn the company over to other
7 Creditors. I think the conflict is evident.

8 MR. BECKER: I understand that, Your Honor, but there
9 may be other less expensive ways to avoid the problem.

10 THE COURT: Well, have you found any?

11 MR. BECKER: Well, for instance, the people who are
12 appointed to the Investment Committee may not need to be the
13 same people that are there right now, and they could possibly
14 be screened.

15 THE COURT: Regardless --

16 MR. BECKER: But the problem is for them to have
17 material non-public information.

18 THE COURT: Well, I think the problem is having an
19 Investment Committee that is a part of the Board, and therefore
20 members of the Board that have to steer this case through the
21 reorganization process at the outset, that's the conflict.

22 MR. BECKER: Your Honor, this problem arises with
23 respect to any of the official committees in this case, too.
24 They have material non-public information that may affect
25 whether they can trade their holdings.

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 THE COURT: Oh, it does, but it isn't an issue of
2 Directors trading their holdings. This is an issue about the
3 Directors advising or deciding what investments to make on
4 behalf of the employees of a company when the investors may
5 want to put the money back into Grace stock knowing that Grace
6 stock may not be worth what it's worth now or may not be owned
7 by who it's owned by now.

8 MR. BECKER: Your Honor, if I understood the Debtors'
9 pleadings, there are no more purchases of Grace stock. The
10 issue is whether it should be sold or not --

11 THE COURT: Well --

12 MR. BECKER: -- and there are other possible
13 solutions. You can preclude the Plan from trading their stock.
14 They just have to hold what they have right now.

15 THE COURT: Why would you want to do that with
16 employees who you want to foster a good relationship with the
17 company? I mean, they're already probably going to take a hit
18 on the value of the stock, and now you don't want them to be
19 able to trade it? And yet you expect that they're going to be
20 there post-reorganization?

21 MR. BECKER: Well, we certainly don't want it to
22 harm the Debtors' employees' morale. The issue is whether you
23 need to pay \$530 thousand a year minimum on the basis that
24 these Directors might have material non-public information,
25 they might subsequently be sued and have some indemnification

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 claim against Grace, and that the case is not settled. Now,
2 depending on how long this goes on, how much is that insurance
3 worth? That's a pretty steep price to pay.

4 THE COURT: Well, if you want a continuance until
5 November 17th so that you can see whether you can come up with
6 a less costly alternative I'll do that. I am going to direct
7 the Debtors to take a look at officer's compensation who are
8 normally on the Investment Committee to see whether or not this
9 is a material duty that they were engaged in and whether or not
10 some, not necessarily all, of this cost shouldn't come from
11 there. It seems to me a part of their, {in quotes}, "job
12 description," is to perform the service and they're not, then
13 this is an issue, and because I do agree part of it is to solve
14 a problem that they have in the event that they make a decision
15 and then are subject to suit whether it's a good faith decision
16 or not, I agree. It is also, however, for the benefit of the
17 employees knowing that the people who make that management
18 advice are not conflicted, and the members of the Investment
19 Committee are conflicted, and therefore shouldn't be making
20 this decision as this Plan gets closer toward being finalized.
21 So, if you want an opportunity to see what you can come up with
22 that's, I'll call it a least restrictive alternative, I'll give
23 you that opportunity, and you can file something if you can.
24 Otherwise, it seems to me State Street Bank obviously has the
25 resources to be able to handle this, they perform this function

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 for numerous other clients, it doesn't seem to be an issue with
2 respect to their confidence, it seems to be an issue simply as
3 to how they should be paid, and so I think you folks ought to
4 talk about how they should be paid. With respect to their
5 professionals filing fee applications, or at least being
6 subject to Court scrutiny, I agree. At this point in time they
7 should be subject to that -- to some Court scrutiny, at least
8 while the Chapter 11 Plan process is winding its way through
9 the Courts. Because what I don't want to see is that the
10 investment -- advisory services are relatively inexpensive but
11 the legal fees that are occasioned by it are astronomical, and
12 the only way to control that that I know of is to make them
13 subject to a fee application process. So, I'll approve it
14 unless the Equity Committee and the Creditors Committee come up
15 with something between now and November 17th. On November 17th
16 I would expect to approve this motion, but subject to (a)
17 having the professionals required to file fee applications with
18 the Court; and (b) seeing how this fee is going to be paid,
19 that I hope you folks can negotiate, and I'm not making a
20 determination on that issue now. I'm reserving determination
21 on that until November 17th.

22 MR. BECKER: Thank you, Your Honor.

23 THE COURT: All right. So, this matter's continued
24 to see whether you can resolve it.

25 (Pause in proceedings)

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 THE COURT: Okay.

2 MS. BAER: Your Honor, the next matter on your
3 agenda, item #7, is the motion of Oldcastle APG Northeast for
4 lifting of the automatic stay. I've spoken with counsel for
5 Oldcastle, and they are agreeable to continuing this motion to
6 the next hearing on November 17th. What they want to do is
7 discuss with Grace whether there is some third party discovery
8 that may solve their issue, and I said we're certainly willing
9 to talk about that. We'll see what we can work out, and then
10 if it can't be resolved we'll take up the Stay Motion with you
11 on the 17th.

12 THE COURT: All right. Good afternoon.

13 MR. SULLIVAN: Good afternoon, Your Honor, Bill
14 Sullivan on behalf of Oldcastle APG Northeast. Your Honor, my
15 client is the manufacturer, or supplier of concrete masonry
16 units which incorporated Grace's product dry block and was used
17 in the construction of an elementary school in Everett,
18 Massachusetts. The city of Everett brought suit against
19 various parties involved in the process of construction after
20 there were alleged severe deficiencies in the water repellant
21 abilities of the school and potential mold damage. Your Honor,
22 this case has been pending since 2000. My client filed a
23 Motion for Relief from the Stay to seek to add Grace as a party
24 to that litigation. Your Honor, we have agreed to continue the
25 hearing on this motion for one month, and at the heart of it is

Walter's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 the fact that Grace and my client may be on the same side in
2 some respects with respect to this claim, so we're going to
3 pursue working with Grace to get some materials and perhaps
4 some discovery answered. This case has a discovery cutoff of
5 May, 2004, and to the extent that we can't resolve everything
6 that my client needs we'll be back here, Your Honor. We feel
7 this is a claim where Grace, if brought in, will contest
8 liability. It will need to be resolved, liability will need to
9 be resolved, but we don't need to argue the merits of whether
10 stay relief is appropriate at this time.

11 THE COURT: Okay. Has Oldcastle or whoever has the
12 claim against the Debtor, I guess the State of Massachusetts,
13 filed a claim?

14 MR. SULLIVAN: Your Honor, my client filed a Proof
15 of Claim --

16 THE COURT: Okay.

17 MR. SULLIVAN: -- against Grace.

18 THE COURT: All right. I'll see you November
19 17th if I don't get a stipulation in the meantime. Thank you.
20 Ms. Bear?

21 MS. BAER: Your Honor, item #8 on the agenda is the
22 Debtor's Motion to Approve a settlement with KWELMB Companies.
23 Your Honor, the KWELMB Companies are insolvent insurance
24 carriers, I believe in London. In 1996 Grace settled with a
25 number of London insurers. KWELMB was, although part of that

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 group, was not part of the settlement due to the fact that
2 they were in insolvency proceedings. Since that time progress
3 has been made, and at this point KWELMB is now agreeable to, if
4 you will, kind of become part of that settlement. What the
5 settlement will do is allow Grace's claim in the amount of
6 \$4,337,182.73, which is consistent with the overall settlement,
7 agreement, and arrangement that was reached in 1996 with all
8 the other insurers. KWELMB will be required under the way in
9 which the settlement works given the dividends they've been
10 paying to pay Grace about \$1.8 million now, and then Grace will
11 be entitled to continue dividends on their claim as KWELMB
12 winds up its affairs and pays its claims. Your Honor, nobody
13 has filed an objection to this, however, the London insurers
14 have filed an objection with respect to the fact that
15 accidentally the original 1996 Settlement Agreement, which had
16 confidentiality provisions, was attached to the motion. We've
17 spoken with the London insurers and they have assured us that,
18 again, they have no objection to the merits of the Settlement,
19 but would like us to put some procedures in place to undo the
20 mistake that was made. They have provided a Draft Order which
21 we can provide to the Court today which outlines the following:
22 #1, Request that the Court strike from the docket the
23 Settlement Agreement; #2 Request that all parties who were
24 served with notice of the motion and a copy of the motion
25 destroy the attached Settlement Agreement. In addition, Your

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 Honor, I've agreed with the London insurers that they reserve
2 all rights to assert damages to the extent that they believe
3 there could have been -- there were damages as a result of the
4 disclosure. We're not aware of any. We hope that, and don't
5 believe thatm there are any, but it was an inadvertent mistake,
6 and they reserve their rights in that respect. I believe
7 they're here to address their opposition.

8 THE COURT: All right. Good afternoon.

9 MR. MURPHY: Good afternoon, Your Honor, I'm Francis
10 Murphy, I'm with Murphy, Spadaro & Landon here in Delaware.
11 Michael Zoellar is here from Baach, Robinson & Lewis. We had
12 filed a pro Hac motion for him, Your Honor, a few weeks back,
13 I but I don't believe it's been granted as yet.

14 THE COURT: Okay, I'll look for it. I'm not aware
15 of it, I haven't seen it, but I will look for it.

16 MR. MURPHY: I know, Your Honor. Mr. Zoeller,
17 though, I think can address this, if it's acceptable to the
18 Court.

19 THE COURT: Yes, sir, thank you.

20 MR. MURPHY: Thank you, Your Honor.

21 MR. ZOELLER: Good afternoon, Your Honor.

22 THE COURT: Good afternoon.

23 MR. ZOELLER: Like Ms. Baer said, we don't have any
24 objections to the Settlement Agreement itself, but this
25 Settlement Agreement with London Market Insurers from 1996 was

1 on the record and is available for anybody to download on
2 pacers. This is a confidential Settlement Agreement.

3 THE COURT: It should be stricken.

4 MR. ZOELLER: Right.

5 THE COURT: I don't see any reason why it shouldn't
6 be stricken.

7 MR. ZOELLER: And to the extent that we reserve our
8 rights, again, we don't see any claims arising from this, but
9 is that something that the Court should include in its Order,
10 or whether --

11 THE COURT: Yes.

12 MR. ZOELLER: -- we should just put it on the record.

13 THE COURT: I think it should be included in the
14 Order, yes.

15 MR. ZOELLER: Okay, all right, thank you, Your Honor.

16 THE COURT: Do you have an Order, or you're going to
17 have to submit one.

18 MS. BAER: Your Honor, Grace had agreed to a Form of
19 Order that did not have any mention in it with respect to their
20 reservation of potential damages for the inadvertent
21 disclosure. I'm not real comfortable with the language they
22 did draft, and may I suggest that we work that out together,
23 and then submit to you an order.

24 THE COURT: That's fine. Sooner rather than later
25 if you want this one stricken from the docket, because it's

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 going to take me a while to get it deleted.

2 MR. ZOELLER: Thank you, Your Honor.

3 THE COURT: Okay. And let me make a note so that my
4 staff is clear that they are to strike it once the Order comes
5 in.

6 MR. ZOELLER: It's, just for the record, Your Honor,
7 docket entry #4460 and it's attachment #2 to that docket entry.

8 THE COURT: Okay.

9 MR. ZOELLER: It's actually only part of that
10 attachment, but in order -- I don't believe you can strike just
11 part of an attachment, so the Draft Order had in there
12 direction for the Debtor to submit a revised attachment, too.

13 THE COURT: Okay, that's fine.

14 MS. BAER: Your Honor, the Draft Order outlines
15 exactly which docket order entry so your clerk should have
16 pretty clear direction.

17 THE COURT: All right.

18 (Pause in proceedings)

19 THE COURT: Okay.

20 MS. BAER: Your Honor, the next item on your agenda
21 is item #9. It's the Debtors' Motion for Modification of the
22 Court's preliminary injunction to permit certain third party
23 appeals to proceed. Your Honor, I believe that the Smolkers,
24 who are involved in this matter, are on the telephone.

25 THE COURT: Is anyone present on the phone?

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 MR. SMOLKER: Gary Smolker is present on the phone,
2 Your Honor.

3 THE COURT: All right.

4 MS. BAER: Your Honor, Grace is simply trying to do
5 the right thing here. In January of 2002 when the Court's
6 Preliminary Injunction was entered it apply a stay to all of
7 the actions with respect to the Smolkers including certain
8 appeals that were pending in various Courts in California.
9 Your Honor, since that time Pacific Villas' Homeowners'
10 Association and one of the condominium homeowners that was
11 involved in some of those appeals, James and Julie Holland,
12 contacted Grace, indicated that there had been some dismissals
13 of them from the Smolkers' action in the State Court. Those
14 dismissals were on appeal as well as, I believe, some requests
15 for attorney's fees by one of the parties. The items as we
16 understood and was represented to us were on appeal simply
17 having to do with the dismissal of these parties from the
18 lawsuit. Grace agreed with them that to the extent that
19 that's all at issue it does not affect Grace. It was certainly
20 not our intension to stay things that had no affect whatsoever
21 on Grace, and Grace was agreeable, again, to the extent that
22 this had no affect on Grace whatsoever to having this stay
23 modified slightly so that these appeals could be completed, and
24 if, in fact, the dismissals were sustained Pacific Villas and
25 the Hollands would be out of the Smolker action entirely. The

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 stipulations that Grace entered into with Pacific Villas and
2 with the Hollands specifically suggested that in the event that
3 the appeals were unsuccessful on their behalf, and the Court
4 reversed the lower Court, and then these people were, in fact,
5 still involved in the underlying action, and there were cross
6 actions against Grace. That is all still completely stayed.
7 The only intention here was to allow the appeal over whether or
8 not the dismissal should take place and whether or not some fee
9 should be awarded could be completely in the Appellate Court.
10 Since filing the motion the Smolkers have filed a response.
11 The response suggested that Grace would be affected and the
12 other parties then filed a reply, if you will. The Hollands
13 filed a reply, again, reiterating what was the intention of the
14 parties here and how it does not affect Grace. Based on what
15 Grace has seen, we don't see that these particular appeals do
16 affect us, therefore we're not opposed to the stay being
17 modified slightly so that the appeals can go forward, but in
18 some with respects, Your Honor, it's not our fight. I mean,
19 Grace really is content with the Preliminary Injunction that
20 is entered, believes it was very much appropriate at the time,
21 still continues to be appropriate at the time, but I would say
22 that it sounds as though these actions were sort of
23 inadvertently part of the bigger picture, and from Grace's
24 perspective we have no objection to the Preliminary Injunction
25 being slightly modified only to allow these appeals to proceed.

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 THE COURT: Mr. Smolker?

2 MR. SMOLKER: Well, we had an extremely contested
3 hearing on this about two years ago where we went over these
4 issues in great detail, and there was nothing inadvertent
5 about it, and it was specifically included that the appeals
6 would be stay in their entirety. We were against anything
7 being stayed besides the action against Grace, but Grace
8 pointed out that Grace's product is what is at issue and all of
9 these actions and that it's impossible to separate out Grace's
10 product from any of these actions. It's very convoluted in
11 terms of there may be five, or six, or nine different orders on
12 appeal, and each one is connected and interrelated to the
13 others, and that's why they're all consolidated, and it really
14 wouldn't be possible for the Court of Appeal to make a decision
15 on either the Hollands' -- what we'll call the Hollands'
16 appeal, or the Pacific Villas' appeal without making a decision
17 on all the other appeals, because they have so many issues in
18 common, and they're consolidated, and the record on appeal is
19 just, for all intents and purposes, one record or at most two
20 records, and there was only supposed to be one appeal brief or
21 at most two appeal briefs, and all the other parties in the
22 appeals have vested interest in it, and just to give you two
23 examples of the complications, the Hollands filed a cross
24 complaint against Grace and Home Savings Termite Control and
25 other people, which I attached to my objection to their Motion

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 for Leave to file a reply to my opposition, in their reply they
2 said that they hadn't made a claim against Grace, that's
3 blatantly untrue. They filed a cross complaint against Grace,
4 and I attached a copy of the cross complaint, and more
5 importantly, in their cross complaint, I mean, this is what
6 persuaded you at the hearing about two years ago, against my
7 objection, and I'm not claiming I was right and you were wrong
8 then --

9 (Laughter)

10 MR. SMOLKER: -- that the action against Termite
11 Control -- Home Savings Termite Control, which is the company
12 that applied the Grace product, they, Home Savings Termite
13 Control, has filed a cross complaint against Grace, and they,
14 Home Savings Termite Control, have filed a claim in the Grace
15 bankruptcy, so anything that goes forward that implicates
16 Termite Control, it was pointed out, implicates Grace. Now,
17 also in these appeals are claims against the insurance carrier
18 for the Hollands and the Home Owners' Association, and in a
19 comprehensive general liability policy there's something called
20 a med-pay provision that basically says if somebody is hurt on
21 the premises that this insurance relates to and they have to
22 get medical expenses that, without going into negligence or
23 liability, they just are direct insured under the policy, and
24 that can submit their medical bills, and they get paid. Well,
25 the insurance company for the Hollands and the Home Owners'

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 Association were submitted these insurance claims, they denied
2 them, and we had two different trial Judges at two different
3 times in the underlying actions, even though in California
4 you're only supposed to have one Judge for all purposes, and
5 the first Judge that ruled on the demur of the first insurance
6 company said, yes, of course, it's covered under the med-pay,
7 and then the second Judge that ruled on the other insurance
8 company said of course it isn't covered. So, that's one of
9 the things on appeal, and depending upon how the Court of
10 Appeal went on the issue that the Hollands raise and the Home
11 Owners' Association raise would also affect and implicate the
12 liability under the insurance policy. So, to explain all this
13 in a minute or two you is beyond my ability so I appreciate
14 how I might seem a little incoherent, and that's why I asked
15 if you want to accept the Hollands' reply, if they know why,
16 you should treat it as an independent motion, and give us time
17 to respond to it so we can explain to you how everything is
18 interrelated and it's not possible to separate it. It's
19 literally a Gregorian knot, and our Court of Appeals would
20 prefer to have one appeal brief on all persons that have
21 similar and totally related legal issues instead of separate
22 ones, and they never gave notice to all the parties when Grace
23 made this motion. Now, Grace has said that it has really no
24 interest in this and that it's just trying to do what's right.
25 I think Grace's time would be better spent trying to do

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 whatever's required in the bankruptcy proceeding and not get
2 involved in charitable endeavors to save the world, because
3 they don't have the time or the energy to do that, and they
4 don't have enough perspective to understand what they're
5 doing. From the point of view of someone that has to do the
6 work that's extremely burdensome they have to do more than one
7 appeal on what's essentially the same issue, that is totally
8 unfair to the other people that have the same legal issue.
9 Now, the Hollands' pointed out in their motion that there was
10 an appeal on the Kay matter, but they didn't play out why
11 didn't they lend their appeal, and that's also a complicated
12 story that, if you wish I'll take up your time now or I'll take
13 up your time in a supplementary brief on it, but very simply
14 there were different issues raised and different complaints,
15 and the Hollands' motion was granted without Leave to Amend the
16 one time that it was heard, and I think the Court of Appeal's
17 gonna over turn it because basically this case caused so much
18 work in the trial Court that the trial Judge was trying to be
19 efficient, and this was just the way he saw of maybe getting
20 rid of the case, but it really didn't, and it won't. So,
21 basically, Grace says it has no real interest in the outcome of
22 this hearing so I don't know why they brought the motion. I
23 have a great interest in the outcome of the hearing because
24 it's how much work I have to do at the Court of Appeal and when
25 I have to do it, and I would rather, and I think the Court of

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 Appeal would rather just have this proceed in the orderly way
2 it's been set up to proceed instead of trying to split out
3 people whose demurs were granted at the same time as other
4 people and are all part of one appeal that has similar legal
5 issues, if you're not releasing everyone else, and also if they
6 wanted to be released and they didn't have their own
7 complications they could have been served. The motion by Grace
8 could have told you why they did or didn't join in the motion,
9 that would be, I would think, the preliminary thing. If you
10 have any inclination to grant this motion, that they say they
11 have no interest in, I think before you do you should ask Grace
12 to contact the people that have the interest in the outcome,
13 ask them whether or not they're in favor of this, and why they
14 are or why they're not, and proceed from that. I mean, the
15 problem with this motion is, besides it being wrong thought, is
16 it's the wrong procedure. They didn't contact, or give notice
17 to, the people that are interested and solicit their input on
18 how it would affect them. I told you how it would affect me.
19 It'll just create more wheel spinning and more complications
20 and make it take more work and be more expensive to get to the
21 ultimate result instead of going in the efficient way of --
22 currently set up to proceed.

23 THE COURT: All right. I'm not really sure I see
24 why the stay has to be relieved at this point, frankly. It
25 would seem to me that it's better to try to get this case in

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 a posture where the State would be terminated for all matters
2 not just going forward on an appeal that may result in a
3 remand that's then going to end up staying the case again
4 anyway.

5 MR. SMOLKER: Exactly.

6 THE COURT: Yes, sir, good afternoon.

7 MR. WALSH: Good afternoon, Your Honor, Tom Walsh
8 with McCarter & English on behalf of James and Julie Holland.
9 I just ask the Court not to lose sight of a couple things here
10 that I think Mr. Smolker omits, and rather than, as he said,
11 approach this as a convoluted case, as to my clients this is
12 really very simple, and they deserve to allow their appeal to
13 go forward and it's this simple. They bought this condominium
14 days before the Smolkers filed suit. Their predecessor, their
15 seller, Carol Kay, was dismissed from the case, period. Now
16 Mr. Smolker will proceed on a theory that somehow my clients,
17 who bought this house from somebody who was dismissed, has
18 somehow inherited liability. I venture to say that's a little
19 bit farfetched. It's not gonna happen. I say it's not gonna
20 happen because the California Court dismissed without Leave to
21 Amend after the fifth amended complaint. The preliminary
22 injunction -- and that was in November '99. The preliminary
23 injunction has been in place since 2002. Now we're almost
24 two years, a year and ten months roughly, coming up on the
25 preliminary injunction when my clients have essentially been

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 dismissed from this case, except for these outrageous appeals,
2 since November '99. They've sold the place. They are entitled
3 to be dismissed from this case. That is what's gonna happen.
4 That's what the Court will see.

5 THE COURT: Is that the only issue, whether the
6 Hollands should or shouldn't remain in the case?

7 MR. WALSH: If the appeal goes forward they will be
8 dismissed. We're very confident of that.

9 THE COURT: Is the only issue on appeal whether the
10 Hollands should remain in the case or not?

11 MR. WALSH: I think Mr. Smolker will have to answer
12 that. The appeal, as I understand it, has been the same
13 underlying issue, and that's of liability. Keep in mind,
14 again, that there must be some assumption that my clients'
15 inherited liability from a person who was dismissed from
16 liability. Now, here we are four years later from that
17 dismissal of my clients, not only their predecessor, and they
18 don't want to go forward.

19 THE COURT: I think they don't want to go forward
20 because I've imposed a stay that says that they can't go
21 forward as to the Debtor, and their issue is, if I recall
22 correctly, that the Debtor has some liability for the
23 pesticides and whatever else. I don't really remember all the
24 merits of what the suit alleges at the moment in the case. And
25 so if the issue is whether or not -- if the issue on appeal

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 that I can relieve the stay for is limited to whether or not
2 the Hollands are proper parties to the suit, then I'm willing
3 to let Relief from Stay go forward because whether they are or
4 are not won't affect the Debtors one way or the other. If
5 there is something other than that then I'm not sure at this point
6 what it is that the Hollands want to do. If the Appellate
7 Court determines that the Hollands are not proper parties to
8 the suit and dismisses them out that's not going to affect the
9 Debtors. If he holds them in then the only way it would affect
10 the Debtors is if he sends it back to Court for trial and the
11 trial has to include all parties, one of which is the Debtor.
12 And if that's the case as to the Debtor I'm not going to let
13 the trial go forward.

14 MR. WALSH: Well, Your Honor, I would suggest that
15 that is exactly the case. Without having it before me, the
16 Dismissal Order, Carol Kay was dismissed individually having
17 nothing to do with W.R. Grace. They weren't in Chapter 11
18 yet. My clients were dismissed. W.R. Grace was not dismissed.
19 This is on appeal. The dismissal, again after the fifth
20 amended complaint, I would think the Court of Appeals would
21 look at this record very quickly and easily and affirm or not
22 the decision. And if it's or not the stay is in place and
23 their protections to W.R. Grace remain. Otherwise, it should
24 go forward and not keep parties like the Hollands hanging out
25 there for years upon years with what will ultimately be a

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 frivolous lawsuit.

2 THE COURT: Okay. I'm not understanding, Mr.
3 Smolker, why as to the Hollands the issue of whether or not
4 they're proper parties shouldn't go forward. It doesn't affect
5 Grace in any way whatsoever.

6 MR. SMOLKER: I disagree, and I'd like to first clear
7 up some things that the attorney said. He said he didn't know
8 what the underlying action was about, he didn't know what the
9 complaint was about, he didn't know what the appeal was about,
10 that this was a fifth amended appeal, excuse me, complaint, and
11 therefore that has some significance. This is the fifth
12 amended complaint because other people, other than the Hollands
13 demur, and the Hollands demur was never heard until the fifth
14 amended complaint. The Hollands have, and certain other
15 people, cross complaints in this action. There are all kinds
16 of different cross complaints by different people against each
17 other --

18 THE COURT: Yes, but this --

19 MR. SMOLKER: -- the Hollands are not in because
20 they inherited liability. The Hollands are in because, and
21 the lawsuit was filed before the Hollands bought their condo.
22 The Hollands are in because there was a pesticide in the wall,
23 and the only people that could remove the pesticide were the
24 owners, and the Hollands became the owners, and they refused
25 to do anything to move the stuff that's in the wall. If the

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 Court let the -- the thing on appeal is not only whether or
2 not the Hollands are a proper party. The Court heard a great
3 number of demurs at the same hearing, one of which was the
4 Hollands' and it granted the demurs after the tenant ruling
5 was not granted, it granted the demurs on the basis among
6 others that there was insurance to cover the claim being
7 asserted against the Hollands. On the other hand, it let off
8 the insurance company on the basis that there wasn't insurance
9 on a demur. So, essentially they treated the demur as a
10 speaking motion for Summary Judgment. Whether or not the
11 Court of Appeal is gonna do this or that is speculation. My
12 best decision is they're gonna reverse the finding, but the
13 thing that isn't speculation is that the Hollands do not have
14 a free-standing appeal. The Hollands' appeal is an appeal of
15 an order that includes other parties that were dismissed that
16 have the same legal issue who are not asking for this to be
17 essentially bifurcated, and --

18 THE COURT: Well, it seems to me that I can't --

19 MR. SMOLKER: -- it's generally related with
20 different insurance coverage issues against different insurance
21 companies where different trial Judges have made inconsistent
22 rulings, some of which are on appeal, and it's also
23 consolidated with other rulings that were made at other times
24 and different appeals that were filed that all became
25 consolidated. Now, after everything became consolidated the

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

The Court - Finding

38

1 procedure in our California Courts are, you have to designate
2 a record on appeal. So, we designated, essentially, one
3 record on appeal. This one record on appeal or so has been
4 consolidated is what everyone's gonna refer to when they write
5 their briefs. When you have consolidated appeals you get to
6 write one brief for all the appeals, not a separate brief for
7 each different person.

8 THE COURT: Mr. Smolker --

9 MR. SMOLKER: -- so essentially what they're asking
10 is for the Court of Appeal to ignore the dismissal of other
11 parties who also have similar legal issues and similar facts
12 because they all had their demur dismissed at the same time,
13 and to rule on this. There are so many interrelationships
14 between the Home Owners' Association, the homeowners, and the
15 insurance companies, and the pesticide applicator and who hired
16 them, and what they did, and why they did it, and how it was
17 maintained after it happened, that there's really no practical
18 way to let just part of an appeal go forward --

19 THE COURT: Yes, there is. Mr. Smolker, yes, there
20 is a practical way, and this is what I'm going to do.

21 MR. SMOLKER: Okay.

22 THE COURT: I'm going to lift the Preliminary
23 Injunction, not just for the Hollands but for any other party
24 who wants to contend on appeal that either a dismissal as to
25 them was appropriate for whatever reason, or conversely that a

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 dismissal as to that party was inappropriate, depending on who
2 the appellant in the appeal is, and for no other purpose. In
3 the event that the parties are held in and the action is
4 remanded for trial at that point I'm keeping the stay in place,
5 parties can ask me for a status conference to see whether the
6 stay should be lifted as to all parties including Grace at that
7 time. But for now it seems to me appropriate to get keyed up
8 the issue of who, if anybody, should be the Defendants in this
9 action, so I'm going --

10 MR. SMOLKER: But how are we to know, and I'm asking
11 this not as an argument but for clarification, how are we to
12 know who those parties are? I mean, that's the problem with
13 the way this was presented, and that's the problem for the
14 Court of Appeal and me.

15 THE COURT: You know who the parties --

16 MR. SMOLKER: Who exactly is the stay relieved from?
17 These are all nebulous words that sound great, but who am I
18 supposed --

19 THE COURT: Isn't there an action pending with named
20 Defendants?

21 MR. SMOLKER: Yes --

22 THE COURT: Okay.

23 MR. SMOLKER: -- there's an action pending with named
24 Defendants --

25 THE COURT: Then as to --

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 MR. SMOLKER: -- that's the underlying action.

2 THE COURT: Pardon me, then as to every named
3 Defendant, other than the Debtors, the stay is, or Preliminary
4 Injunction is lifted for any of those parties on appeal to
5 determine who -- to permit the Court of Appeals to determine
6 who the appropriate parties are in the suit going forward.

7 MR. SMOLKER: Okay.

8 THE COURT: So, the Court of Appeals has total
9 jurisdiction to determine as to everybody other than the
10 Debtors.

11 MR. SMOLKER: Okay. Now, just so you'll know, some
12 of the parties are employees of the W.R. Grace company.

13 THE COURT: Okay, have they been dismissed out?

14 MR. SMOLKER: Yes.

15 THE COURT: Okay, if they want to pursue it they
16 can.

17 MR. SMOLKER: Well, I don't know how to respond, if
18 they want to pursue it they can, but I thought your Order was
19 stiff-lipped. I mean, we want to go forward and pursue it. I
20 mean, I've wanted to go forward with this whole thing. I was
21 against anything being stayed --

22 THE COURT: Wait, wait, don't, don't, don't -- it's
23 very late, I've got a very long docket. We went over this at
24 least in two prior hearings if not more before. I understand
25 your position. All I'm trying to do at this point is get this

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 case in a posture through the Appellate Court system so that
2 everybody knows who, if it has to go to trial, is going to go
3 to trial against. And that includes the Grace employees to the
4 extent --

5 MR. SMOLKER: Great. Before --

6 THE COURT: -- to the extent -- pardon me --

7 MR. SMOLKER: -- the Grace employees and Grace argued
8 that Grace had to help everybody resist my action --

9 THE COURT: Mr. Smolker --

10 MR. SMOLKER: -- that that would be a distraction
11 from their bankruptcy because --

12 THE COURT: Mr. Smolker --

13 MR. SMOLKER: -- if they were found at the end then
14 all these other things would happen and this was kind of a nip
15 the bud in the --

16 THE COURT: I want the phone calls placed from here
17 in the future.

18 MR. SMOLKER: -- nip the problem in the bud kind of
19 situation, but now they seem to be --

20 THE COURT: Mr. Smolker --

21 MR. SMOLKER: -- not concerned about --

22 THE COURT: Mr. Smolker --

23 MR. SMOLKER: Yes.

24 THE COURT: Pardon me. I'm done with the argument,
25 please. Let me make findings so that we can get on with this.

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 MR. SMOLKER: Okay, I'm sorry.

2 THE COURT: As to the Grace employees, to the extent
3 that Grace wants to participate in the defense it's free to do
4 so. If they have their own counsel, that's up to them. The
5 stay is lifted as to everybody except the Debtors, including
6 the Debtors' employees for the one purpose, and one purpose
7 only, and that is to determine who the appropriate parties are
8 in the action. Now, who's going to submit an order that will
9 reflect this?

10 MS. BAER: Your Honor, frankly, I think this is
11 horrible. I mean, I'd like to --

12 THE COURT: Look, you asked for it. No.

13 MS. BAER: You know what --

14 THE COURT: No, no, no.

15 MS. BAER: Your Honor --

16 THE COURT: No.

17 MS. BAER: -- this has gone --

18 THE COURT: Ms. Baer, I'm done.

19 MS. BAER: Your Honor, this has gone way beyond --

20 THE COURT: Ms. Baer, pardon me --

21 MS. BAER: -- what anybody intended.

22 THE COURT: -- I am done with this matter. This is
23 the Debtors' request, the Debtor's getting what it asked for.
24 It wants some parts of the appeals to go forward, a Court of
25 Appeals should not be in a position to have only a part of

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 this issue before it. There will be binding orders that will
2 be issued, there will be legal issues that will be common
3 issues for various Defendants. So, it's an all or nothing
4 thing, except as to the Debtors. That's the end of it, and I
5 want an order that's going to permit that to go forward. Once
6 the Court of Appeals determines who the appropriate parties
7 are the stay remains in place. I'm not going to permit the
8 trial to go forward until I have a chance to see what the
9 consequences will be for the Debtor, but I am going to permit
10 the Court of Appeals to determine, based on the record that's
11 before it, who the appropriate parties are. The Debtor asked,
12 the Debtor's getting it. Okay. I want that order submitted
13 by the Debtor, run it past Mr. Holland's counsel and the
14 opposing counsel, please, so that you make sure that that's
15 what it says, Mr. Smolker, and it's to do nothing else, only
16 that.

17 MS. BAER: Your Honor, I will prepare that. I just
18 want to make one comment, that is, I apologize. This has
19 become an unpleasant situation, and part of it is
20 unfortunately technology, but I think that the Court is being
21 a little rash to take Mr. Smolker's argument, get frustrated
22 with the argument, as a result grant relief far beyond --

23 THE COURT: Oh, no --

24 MS. BAER: -- what any party anticipated.

25 THE COURT: -- I'm not frustrated with Mr. Smolker's

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 argument except for the fact that I can't interrupt to get it
2 stopped, which is the problem with having the phone call
3 placed from someplace else other than the Court, and so I'll
4 correct that by placing the phone calls from the Court in the
5 future. That's all. I've heard his argument before. I
6 understand the argument. I heard the Debtors' argument before.
7 I granted the Debtors' request. The Debtor's backing off the
8 Debtors' request, but I'm not going to permit it to be
9 piecemealed, it's as simple as that. If it's good for the
10 Hollands it's good for every other Defendant in the case
11 except for the Debtors, and that's why I'm ruling. If the
12 Debtor had no interest in this the Debtor shouldn't have filed
13 the motion. That's the order I want.

14 MS. BAER: Thank you, Your Honor.

15 MR. WALSH: Thank you, Your Honor.

16 MR. SMOLKER: Thank you, Your Honor, may we be
17 excused from your Court proceedings now?

18 THE COURT: Yes, sir, yes you may.

19 MR. SMOLKER: Thank you, very much, Your Honor, bye.

20 (Pause in proceedings)

21 THE COURT: Okay.

22 MS. BAER: Your Honor, the next item on your agenda,
23 item #10, the Debtors' first omnibus objection to claims. Your
24 Honor, there's only one remaining issue, it has to do with
25 Pipeline Services, Inc. We're asking that that matter be

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 continued until November 17th.

2 THE COURT: That's fine.

3 MS. BAER: Your Honor, with respect to item #11,
4 which is the Debtor's Second Omnibus Objection to Claims and
5 Non-Substantive Objection. We have an Order to submit to your
6 Court, Your Honor, it does several things. Some of the
7 objections are sustained, some of the objections are
8 withdrawn. The best news is with respect to the IRS, which
9 was the great majority of the them. We have ironed out with
10 them which of the claims remain and which of the claims should
11 be expunged.

12 THE COURT: All right, that's fine, I'll take it.

13 MS. BAER: Thank you, Your Honor.

14 (Order handed to the Court)

15 THE COURT: Thank you.

16 (Pause in proceedings)

17 THE COURT: Okay, that Order's entered.

18 MS. BAER: Thank you. Your Honor, the last item on
19 your agenda was a, I think, a Certification of Counsel with
20 respect to a Scheduling Order involving the Montana
21 Vermiculite Action. Your Honor, I'm not sure if that got
22 entered, but since that time I do know the parties are going
23 to be submitting a Supplemental Scheduling Order, and the
24 matter's actually gonna be continued to the December omnibus
25 hearing.

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 THE COURT: Yes, I wondered because -- no, the Order
2 has not been entered because right now it provides that the
3 last day to file anything is the same day as the omnibus
4 hearing, and I knew that couldn't work, so I will not enter
5 that one. Why don't you just submit a revised one?

6 MS. BAER: We will do so, Your Honor.

7 (Pause in proceedings)

8 THE COURT: Okay, I'll accept that one on a
9 Certificate of Counsel, and simply have it entered when it's
10 filed.

11 MS. BAER: Thank you.

12 THE COURT: Okay. I didn't collect from you any
13 Orders that I didn't sign and have to hand back, correct? I
14 did that once this morning, and I want to make sure I didn't
15 do that here, too.

16 MS. BAER: No, Your Honor. I think you have
17 everything, and I just handed you the one on the claims
18 objections, and we'll get it off the docket when it's entered.

19 THE COURT: Okay, that's fine.

20 MS. BAER: So, we're fine.

21 THE COURT: All right. Do you have dates, did I give
22 you dates beyond April?

23 MS. BAER: No.

24 THE COURT: Okay. Well, three times today I've
25 misplaced my list, and I've done it again. It's too little.

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191

1 Oh, here it is, okay. May 24th in Pittsburgh, June 21st, July
2 19, August 23, September 27, October 25, November 15, and
3 December 20 in Pittsburgh.

4 MS. BAER: Your Honor, what time are those set for?

5 THE COURT: What I'm trying to do, Ms. Baer, from
6 January forward is to keep Grace at noon. I won't really know
7 until probably February when I have the experience of two
8 months of doing it whether my new scheduling process is going
9 to work, so for now let's say noon --

10 MS. BAER: Okay.

11 THE COURT: -- but we'll talk in February
12 about whether that's going to work.

13 MS. BAER: Thank you, Your Honor, I understand.

14 THE COURT: Okay. All right, any other matters to
15 be addressed today?


16 MS. BAER: I think that completes the agenda, Your
17 Honor.

18 THE COURT: Okay, thank you. We're adjourned.

19 (Court adjourned)
20

21 CERTIFICATION

22 I certify that the foregoing is a correct transcript from the
23 electronic sound recording of the proceedings in the above-
entitled matter.

24 
25 Signature of Transcriber

11-10-03
Date

Writer's Cramp, Inc.

Certified Court Transcribers

732-329-0191